

**MINUTES**  
**WARRICK COUNTY AREA BOARD OF ZONING APPEALS**

Regular meeting held in Commissioners Meeting Room,  
Third Floor, Historic Court House,  
Boonville, IN  
Monday, January 28, 2013, 6:00 PM

**PLEDGE OF ALLEGIANCE:** A moment of silence was held followed by the Pledge of Allegiance

**MEMBERS PRESENT:** Tina Baxter, Terry Dayvolt, Don Mottley, Jeff Willis, Mike Winge Judy Writsel, and Jeff Valiant.

Also present were Morrie Doll, Attorney; Sherri Rector, Executive Director; Sheila Lacer, and Tara Dickerson; Staff.

**ROLL CALL:** Roll call was taken and a quorum was declared present.

**MEMBERS ABSENT:** None

**ELECTION OF OFFICERS:**

Mrs. Rector stated the first order of business is to elect a Chairman of the Warrick County Board of Zoning Appeals to serve during 2013.

Judy Writsel made a motion to elect Jeff Valiant as Chairman.

Mrs. Rector asked if there were any other nominations. Being no other she asked for a motion to close the nominations.

Don Mottley made a motion to close the nominations and elect Jeff Valiant by acclamation. The motion was seconded by Mike Winge and unanimously carried.

The Executive Director turned the meeting over to the Chairman.

The Chairman stated the next order of business is to elect a Vice-Chairman of the Warrick County Area Board of Zoning Appeals to serve during 2013.

Mike Winge made a motion to elect Terry Dayvolt as Vice-Chairman. Judy Writsel seconded the motion.

Judy Writsel made a motion to close the nomination and to elect Terry Dayvolt by acclamation.

The motion was seconded by Mike Winge and unanimously carried.

**SET MEETING DATES, TIME, AND PLACE:**

The Chairman stated the Board needs to approve the meeting dates and times. Mrs. Rector stated that the meetings are to be held on the 4th Monday at 6:00 PM each month in the Commissioners Meeting Room,

Third Floor, Court House, Boonville, Indiana; except for November, which will be November 18, 2013 and December, which will be December 16, 2013, on the 3<sup>rd</sup> Monday, due to the holidays.

Terry Dayvolt made a motion to accept the listed 2013 meeting dates, time and place.

Don Mottley seconded and the motion carried.

#### **ADOPTION OF RULES AND REGULATIONS:**

Mrs. Rector stated she would like to suggest to the Board that they adopt the 2012 Rules and Regulations until such time that she brings them back with any amendments. Mrs. Rector stated that she is working on changes that involve the Planning Commission and is not for sure if they affect the Board of Zoning Appeals.

Mike Winge made a motion to adopt the 2012 rules and regulations for 2013.

Don Mottley seconded and the motion carried.

#### **MINUTES:**

To approve the minutes of the last regular meeting held December 17, 2012.

Judy Writsel made a motion to approve the minutes from the December meeting.

Mike Winge seconded and the motion carried.

#### **BZA-SU-13-01**

**APPLICANT:** Husk Signs by Kathy Long, Account Executive **OWNERS:** Ted Brown's Quality Paint & Body Shop by Ted Brown, Owner

**PREMISES:** Property located on the East side of Epworth Road approximately 1450 feet North of the intersection formed by Epworth Road (W 1050) and Oak Grove Road (S 300), Ohio Twp. (Complete legal on file) 2722 *Epworth Road*.

**NATURE OF CASE:** Applicant requests a Special Use S-U-08, from the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County, IN to allow: the addition of an electronic message board on an existing sign in a "M-1" Light Industrial zoning district. *As Advertised in the Boonville Standard, January 17, 2013*

Kathy Long, Account Executive, and Ted Brown, Owner was present.

Chairman Valiant called for a staff report.

Sherri Rector stated we do have all returned receipts from certified mail. Mrs. Rector stated the request is for a Special Use to allow the addition of the electronic message board on an existing sign in a "M-1" Light Industrial zoning district. Mrs. Rector said the applicant states "New electric sign with changeable

electronic message center.” Mrs. Rector stated the sign permit for the rest of the sign was issued on December 17, 2012 for a 8’X16’ sign. Mrs. Rector said this will be added which will not increase the size of the existing sign. Mrs. Rector stated the photographs show where it is going to go in relationship to what is already there. Mrs. Rector stated it meets all setbacks and size. She said the existing land use is a body and paint shop. She stated the property to the West is zoned “M-1”, all other surrounding property is zoned “A” Agriculture with a residence, and all other property is farm ground. Mrs. Rector stated there is a portion of the property that lies in the flood plain, but will not affect the permit for the sign. Mrs. Rector said the entrance is off Epworth Rd. Mrs. Rector stated that the applicant has answered all the questions on the proposed use statement. She said that if approved, the approval should state the requirements of this type of Special Use which are subject to no use of the words, ‘stop’, ‘danger’, ‘look’, or any other word which would confuse traffic. Mrs. Rector said the approval is also subject to no revolving beams of light or strobe lights. She stated the application is in order.

The Chairman asked Mrs. Long and Mr. Brown if there was anything they would like to add to the staff report.

Mrs. Long replied no.

Chairman Valiant asked if there were any questions from the Board members.

There were no questions.

Chairman Valiant asked for remonstrators, being none, the Chairman called for a motion.

Don Mottley made a motion finding of fact be made as follows from the testimony and proposed use statement:

1. The USE is deemed essential or desirable to the public convenience or welfare.
2. The USE is in harmony with the various elements or objectives of the Land Use Plan for Warrick County.
3. The USE will not be a nuisance or serious hazard to vehicles, pedestrians, or residents.
4. The USE as developed will not adversely affect the surrounding area.
5. Adequate and appropriate facilities will be provided for proper operation of the USE.
6. The specific site is appropriate for the USE.

And the Application be approved in accordance to the application and plans on file, subject to the following conditions:

1. Subject to an Improvement Location Permit being obtained on the existing sign including the new message board.
2. Subject to any required Building Permits being obtained.
3. Subject to the Special Use not being altered to become any other use nor expanded than that which was approved by the Board of Zoning Appeals.

4. Subject to the property being in compliance at all times with the applicable zoning ordinances of Warrick County.
5. Subject to all public utility easements and facilities in place.
6. Subject to no use of the words, 'stop', 'danger', 'look', or any other word which would confuse traffic.
7. Subject to no revolving beams of light or strobe lights.

Mike Winge seconded and the motion was carried unanimously.

**BZA-V-13-02**

**APPLICANT:** Lynnette K. McIntyre **OWNERS:** McIntyre Enterprises, LLC by Lynnette K. McIntyre, Owner & Lynnette K. McIntyre, Trust, Lynnette K. McIntyre, Trustee

**PREMISES:** Property located on the North side of State Road 62 West approximately 0 feet North of the intersection formed by State Road 62 West and HyRock Blvd. Boon Twp. and part of Lots 3 & 4 in West Heights Subdivision Part 1. (Complete legal on file) 3822 *State Road 62 West*

**NATURE OF CASE:** Applicant requests a Variance from the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County Indiana to allow a lot in a proposed minor subdivision to have 40' of frontage along S.R. 62 instead of the required 50' in a "C-3" Highway Commercial zoning district. *As Advertised in the Boonville Standard on January 17, 2013.*

Mrs. McIntyre and Michael Feldbush with U.S. Surveyor were present.

Chairman Valiant called for a staff report.

Mrs. Rector stated that we do have all returned receipts from certified mail. Mrs. Rector said the request is for a Variance from the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County Indiana to allow a lot in a proposed minor subdivision to have 40' of frontage along S.R. 62 instead of the required 50' in a "C-3" Highway Commercial zoning district. Mrs. Rector stated this property was rezoned to "C-3" in 1978. She said the property has a residence and commercial business laid out in different parcels. Mrs. Rector said Mrs. McIntyre needs to do the Minor Subdivision to bring it into compliance with the residence having its stand-alone parcel with its own road frontage. She said due to the location of the commercial building she can only have 40' instead of the 50' that is required. Mrs. Rector said the applicant states "In Article XXI, Section 2, Table B, Footnote 9 of the Comprehensive Zoning Ordinance, it states that all lots shall have a minimum of 50 feet of frontage on a dedicated right of way. Mrs. Rector stated due to an existing building, one of the lots is only able to have 40 feet of frontage." Mrs. Rector said the existing land is a residence and business. She said the property to the North is zoned "Con", property to the East is zoned "R-1A" with a residence, property to the West is zoned "C-3" with residence and a business. Mrs. Rector stated the property to the South across S.R. 62 is zoned "M-2" with businesses. Mrs. Rector said the property is not located in the flood plain. She said

the entrance is off of State Road 62. Mrs. Rector stated Mrs. McIntyre has submitted a copy of the proposed minor subdivision which will be filed and recorded if she receives this Variance approval. Mrs. Rector said that she will at that time only have two parcels of ground, one with the residence with the 40' of frontage and the business will be on its own parcel of ground with its own frontage along the highway. Mrs. Rector said that right now the way the property has been laid out for years does not have any frontage and is landlocked. Mrs. Rector said that in order for her to do anything with either parcel the Variance will have to be done.

Chairman Valiant asked Mrs. McIntyre is there was anything she would like to add.

Mrs. McIntyre said no.

The Chairman asked if the Board had any questions.

Mr. Dayvolt asked Mrs. Rector if the commercial building affects the land in any way.

Mrs. Rector stated that the approval of the Variance would put the commercial building on its own parcel. She stated that a commercial building only has to be five feet off the property line. Mrs. Rector stated it would be fine to do the 40'.

Chairman Valiant asked if there were any other questions from the Board Members. Being no further questions from the Board and being no remonstrators present he asked for a motion.

Terry Dayvolt made a motion to approve the Variance Application based upon and including the following findings of fact:

1. The grant of the Variance will not be injurious to the public health, safety, morals, and general welfare of the Community. As such, it is further found that the granting of the Variance shall not be materially detrimental to the public welfare.
2. The use or value of the area adjacent to the property included in the Variance will not be affected in a substantially adverse manner. As such, it is further found that the granting of the Variance shall not result in substantial detriment to adjacent property or the surrounding neighborhood.
3. The need for the Variance arises from some condition peculiar to the property involved. The peculiar condition constituting a hardship is unique to the property involved or so limited to such a small number of properties that it constitutes a marked exception to the property in the neighborhood. Such condition is the property is landlocked and was not self-created by the applicant and they want to come into compliance by giving the property its own road frontage.
4. The strict application of the terms of the Warrick County Comprehensive Zoning Ordinance will constitute a practical difficulty, unusual and unnecessary hardship if applied to the property for which the Variance is sought.

5. The approval does not interfere substantially with the Warrick County Comprehensive Zoning Ordinance adopted pursuant to IC 36-7-4-500 et seq.
6. The granting of the Variance is necessary in order to preserve a substantial property right of the petitioner to use the property in a reasonable manner, and not merely to allow the petitioner some opportunity to use his property in a more profitable way or to sell it at a greater profit.
7. That the hardship to the applicant's use of the property was not self-created by any person having an interest in the property nor is the result of mere disregard for or ignorance of the provisions of the Warrick County Comprehensive Zoning Ordinance.
8. The approval of the requested Variance is the least modification of applicable regulations possible so that the substantial intent and purpose of those regulations contained in the Warrick County Comprehensive Zoning Ordinance shall be preserved.
9. The approval of the requested Variance is the least modification of applicable regulations possible so that the substantial intent and purpose of those regulations contained in the Warrick County Comprehensive Zoning Ordinance shall be preserved.
10. This Variance shall expire six (6) months after this date, UNLESS a Permit based upon and incorporating this Variance is obtained within the aforesaid six (6) month period or unless the provision of the Variance are adhered to within the aforesaid six (6) month period. Upon advance written application for good cause, a renewal for an additional six (6) month period may be granted by the Secretary of the Area Plan Commission.
11. The Variance Application is subject to the terms contained therein and the plans on file subject to the following additional conditions:
  - a) Subject to the Minor Subdivision being approved.
  - b) Subject to the property being in compliance at all times with the applicable zoning ordinances of Warrick County.
  - c) Subject to all utility easement and facilities in place.

Don Mottley seconded and the motion was carried unanimously.

**ATTORNEY BUSINESS:**

Attorney Doll states that the Supreme Court has made changes. He said the Court of Appeals has handed down a decision that has made basically every decision we've made illegal. Attorney Doll states that unless we correct our means or method of doing this; we are subject to being challenged at some future date if somebody doesn't like the decision we made.

Mrs. Rector asked when it would be the best time to meet. She said they should have workshops occasionally.

Discussion ensued on when a meeting time could take place.

Attorney Doll said that he could present the matter this evening as Attorney Business.

Attorney Doll stated the case that is a troubling precedent for us as to how we conduct business in Warrick County is Kroger vs. Plan Commission Of the Town Of Plainfield. He said it is an August of 2011 case, so this case is about 18 months old. He said transfer was denied by the Supreme Court which means this is the law of the land in Indiana. Attorney Doll said what happened is that Kroger had a grocery store in a strip center in Plainfield, Indiana and wanted to add gasoline; as you've seen them do and they filed a request for the ability to do that and it was denied. He said in the course of denial what the Planning Commission did was issue negative findings and it just said (1) the proposed development is not appropriate to the site and its surroundings; (2) the proposed development is not consistent with the intent and purpose of the Plainfield Zoning Ordinance; and (3) the proposed development would create a public safety hazard. Attorney Doll said well if you think about what they just said in approving the Variance, they said basically the same thing in reverse. He said Kroger appealed.

Mrs. Rector stated that was zoning.

Attorney Doll replied it is but the Court of Appeals has held this applicable to Variances as well. He said what they are going to look to see is if our decisions are arbitrary and capricious, an abuse of discretion, or violation of the law. He said they appealed two parts of the case; we don't care about the first part, we only care about the second part, which was whether the findings were supported by sufficient evidence. He said what the Court of Appeals came back with and said is when Planning Commissions, or in your case the Board of Zoning Appeals, approves or disapproves an application; in this case it was a development plan, you have to make specific statements of fact as to what about the plan justifies the vote; just not that it doesn't violate the current ordinance, or not that it doesn't harm public safety, etc. He said that is not going to be sufficient. Attorney Doll said the findings are insufficient to support the decision by, in this case, the Planning Commission. He called their attention to the last page, the last paragraph on the second from the back page in the handout; these findings are merely a general replication of a few of the considerations set forth in the Plainfield Zoning Ordinance; the findings do not provide sufficient specificity to inform Kroger why its proposed plans for a gas station were not appropriate to the site and its surroundings or consistent with the intent and purposes of the Plainfield Zoning Ordinance, likewise, the findings do not inform Kroger how its proposed development would create a public safety hazard.

Attorney Doll said that this is a case where they turned it down but the same thing is true if you approve it. He said what they did was remand it back to approve it. He said the approval of the petition has to

meet the requirements and it constitutes a decision that has to have facts specifically stated that support it. He said if you take a look at the last motion that has six different numeral paragraphs that Terry read. He said at the bottom we have the conditions but that is not what they are talking about, it's the top one's we are talking about. He said if we are going to approve Variances, we are going to have to give factual reasons why those six different statements are true, otherwise they are merely conclusions. He said if we get challenge by somebody who opposes a Variance we grant, let's say an applicant comes forward, we hear the evidence, we past our standard preprinted motion and somebody in the audience doesn't like it and they challenge us we will lose. He said that means that on those top six they are going to have to say a fact that supports each one of those statements that is specific to the application. He said if you stop and think about it you have to ask yourself two reasons or two questions; one is why; why is this true, and the other question you could put a different way is because.....

Mr. Winge said if he understands right, they just can't approve something if it doesn't meet those requirements; they have to deny it.

Attorney Doll stated you have to at least state a fact from the application or what you have heard in the hearing that justifies each of those six points and say that fact in conjunction with the six points.

Attorney Doll said the Supreme Court has pretty much said that under Indiana Law virtually never can you approve a Variance.

Mrs. Rector said she doesn't see how that any Variance could meet every one of those.

Attorney Doll said he did not either and neither does the Supreme Court.

Mrs. Rector stated that they have a lot more in their findings. She stated there were four or five things for a Variance you have to look at; they have nine or ten.

Attorney Doll stated that the wording between our ordinance and the State Statue does not match. He said we use different terminology in our ordinance than they do in the State Statue, so as to avoid somebody saying well your approval didn't match the State Statue, that language is in there so someone can't come up and say, it may match the State Statue but your approval doesn't match the language of the Warrick County Ordinance so that language is in there. He said that makes it twice as long and a little bit contradictory and confusing to read, but it touches every required button in the Ordinance and every requirement in the State Statue and that's why they are both in there.

Jeff Willis asked who writes the ordinance.

Attorney Doll stated that in 2005 Warrick County adopted a new county ordinance and it was written then.

Mrs. Rector stated that the Indiana Code that the Board goes by is written by the State Legislator. She added that the ordinance explains what you have to look at for a Variance, Special Use, and how to do a subdivision.

Mrs. Baxter asked if the ordinance needed to be readdressed.



Attorney Doll said he is not saying that but it would be nice if the Variance language matched the ordinance. He said the law is that we can never have anything less stringent than the State Statute but if Warrick County chose to have a more stringent local ordinance, it's capable of doing that.

Mrs. Rector stated that her worry is do we have too much. She said if we add more in to it are we more likely to get sued because basically as it's written, there isn't a Variance that is going to meet every requirement.

Mr. Winge stated that he would be more worried about larger businesses than residential home owners.

Mrs. Rector stated that most of the examples she is looking at is dealing with the Planning Commission not the BZA.

Attorney Doll stated that he is involved in a law suit with Knox County because they got sued because they didn't say why. He said they approved a Variance to allow migrant housing in an Agricultural district and the neighbors went crazy and they have sued the Knox County Board of Zoning Appeals. He said the first hearing occurred and the judge stated that Knox County didn't say why they approved it and you have to say why it didn't affect the neighbor's property and why it didn't devalue the surrounding and why it isn't dangerous to the public safety or welfare of the area.

Mr. Winge stated that if it did that, it wouldn't pass.

Attorney Doll said it did pass and the judge remanded it. He said the Board had to hold a second public hearing and no one spoke except the Board who rehashed all the evidence they heard before and they passed it the second time but this time they said why.

Mrs. Writsel asked if the "whys" have to be read by the person making the motion.

Attorney Doll said yes; it would be better if the person made the motion to say why. He said it also seems to him that the person that makes the motion could say "based upon the discussion we just had about the neighbors and the way this lot sits next to them, I don't think this affects them negatively the surrounding lots."

Mrs. Writsel stated that she thinks there needs to be more questions asked.

Attorney Doll stated that is what he and Mrs. Rector have talked about. He said that he doesn't want to draw these meetings out for hours but unfortunately we have to do something more than what we are doing if we want to increase the probability that we won't get sued or if we do we have information.

Mrs. Rector asked if Attorney Doll could break down the statements and have questions that they could have.

Mr. Winge stated that Attorney Doll is the attorney and he knows what to ask.

Discussion ensued over what questions should be asked. Further discussion ensued over Variances.

Mrs. Rector stated that most the applicants that come to the Board with Variances are people wanting to live in a mobile home until they get their house built. She said that is self-created, so what do you do, not

let them live there. She said most of the things this Board handles are not big factories or anything like that.

Mrs. Rector stated that most of the Variances are for people that can't meet some set back, or they built the house 4" into the building line that they found when they were closing. She said the problem is most of it is self-created.

Attorney Doll stated he knew which is why the Supreme Court has said practically speaking, no one ever deserves a Variance; it was created by human errors.

It was determined they needed to hold a workshop.

Mr. Mottley asked Attorney Doll if the blue book changed any this year.

Attorney Doll said yes but they do not have the current copy. He said they passed a new house bill 13-21 last year and changed it quite a bit. He said nothing in terms of the substance but changed a lot about the organization of the Board.

Mrs. Rector asked they did.

Attorney Doll said yes it became effective July 1, 2012.

Mr. Rector asked the bill number.

Attorney Doll said he think it's 13-21.

Mrs. Rector said they need to find out and get some more books.

Attorney Doll said they don't have them; West Publishing is the Publisher.

Mrs. Rector asked if they had any proposed ones for this year.

Attorney Doll said it's too soon.

Mr. Mottley asked where the other attorneys get the books.

Mrs. Rector stated they received the last ones that were done. She said you have to go online every year to see what bills they have passed if it changes it. She stated that you would think they would update it every once in a while.

Attorney Doll said it was a private publisher, West Publishing Company. He said they are only going to publish it if they can sell it and how many people really want to buy all the zoning statutes in the state of Indiana; not a lot so publishing a book of that is not profitable.

Mr. Mottley said the last one he had was from Mrs. Lockyear and it had some changes.

Attorney Doll stated that the blue book was 2003.

Mr. Mottley said the last one he had was either 2009 or 2010.

Mrs. Rector said that she would ask Mrs. Lockyear.

Attorney Doll said to just check West Publishing. He said as of a year ago they didn't have a new one.

**EXECUTIVE DIRECTOR BUSINESS:**

None

Being no other business Mike Winge made a motion to adjourn.

Don Mottley seconded and the meeting adjourned at 6:50 p.m.

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Jeff Valiant, Chairman

ATTEST:

The undersigned Secretary of the Warrick County Board of Zoning Appeals does hereby certify the above and foregoing is a full and complete record of the Minutes of said Board at their monthly meeting held January 28, 2013.

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Sherri Rector, Executive Director